

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 31, 1997

RAY D. STEPHENS)	
Complainant,)	8 U.S.C. § 1324b Proceeding
)	
v.)	OCAHO Case No. 97B00092
)	
SAFE KIDS INC.)	
Respondent.)	

ORDER OF DISMISSAL

PROCEDURAL HISTORY

This is an action purporting to arise under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA) in which Ray D. Stephens alleged that Safe Kids, Inc. discriminated against him on the basis of his citizenship status by failing to hire him as a telemarketer because he would not furnish a social security number. He also alleged that Safe Kids refused to accept his "Statement of Citizenship" and "Affidavit of Constructive Notice."¹

On December 10, 1997, I issued an order of inquiry in this matter in which I requested that complainant Ray D. Stephens answer two specific questions and provide an explanation as to how, if at all, this case differs from those setting forth the unanimous and unequivocal adverse authority in this forum holding that neither employer's request for a social security number as a condition of employment, Westendorf v. Brown & Root, Inc., 3 OCAHO 477 at 811 (1992),² Lewis v. McDonald's Corp., 2 OCAHO 383 at 701 (1991), nor an employer's refusal to cease withholding from an employee's wages for federal income and FICA taxes, Hamilton v. The Recorder, 7 OCAHO 968 (1997); Cook v. Pro Source, Inc., 7 OCAHO 960 (1997); Horst v. Juneau Sch. Dist. City and Borough of Juneau, 7 OCAHO 957 (1997); Manning v. Jacksonville, 7 OCAHO 956 (1997); Hutchinson v. GTE Data Servs., Inc., 7 OCAHO 954 (1997);

¹ The documents are attached to this order. The first purports to exempt Stephens from withholding for taxes and invokes the authority of the INA; the second purports to exempt him from the social security system.

² Citations to OCAHO precedents reprinted in bound Volumes 1 through 5, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 through 5 are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Hutchinson v. End Stage Renal Disease Network, Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); Werline v. Pub. Serv. Elec. & Gas Co., 7 OCAHO 935 (1997); Cholerton v. Robert M. Hadley Co., 7 OCAHO 934 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Jarvis v. AK Steel, 7 OCAHO 930 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); Winkler v. West Capital Fin. Servs., 7 OCAHO 928 (1997); Smiley v. Philadelphia, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of Am., Inc., 6 OCAHO 923 (1997); Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997); Costigan v. NYNEX, 6 OCAHO 918 (1997); Boyd v. Sherling, 6 OCAHO 916 (1997); Winkler v. Timlin Corp., 6 OCAHO 912 (1997); Horne v. Hampstead, 6 OCAHO 906 (1997); Lee v. Airtouch Communications, 6 OCAHO 901 (1996), appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892 (1996), aff'd sub nom. Toussaint v. OCAHO, 127 F.3d 1097 (3d Cir. 1997), poses an issue cognizable in this forum. The specific questions posed by the Order of Inquiry were whether it was Stephens' contention 1) that Safe Kids employed non-United States citizens from whose wages it did not withhold sums for federal taxes, or 2) that Safe Kids employed non-United States citizens who were not required to furnish a social security number as a condition of their employment.

In response, Stephens, acting through John B. Kotmair, Jr. of the National Worker's Rights Committee, offered vague general conclusions but failed to answer the two specific questions asked. Stephens requested in addition that the complaint be amended 1) to show that he no longer wishes to be employed by respondent because the employer is no longer in business, and 2) to restore the words "to show I can work in the United States" which had been previously crossed out in the form complaint, so that the complaint would read, "The Business/Employer refused to accept the documents that I presented to show I can work in the United States."

Attached to Stephens' response are the subject documents which complainant now seeks to assert the employer refused to accept "to show I can work in the United States." Because it is clear from examination of the subject documents that neither is a document acceptable under 8 U.S.C. § 1324a(b)(1)(B), (C), and (D) to show identity and/or employment eligibility under the employment eligibility verification system,³ I decline to permit the amendment and dismiss the complaint.

DISCUSSION

³ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208 § 421, 110 Stat. 3009, 3670 (1996) amended the INA to narrow the list of acceptable documents after a date within one year after September 6, 1996. IIRIRA also made prospective reductions to the number of acceptable List A documents. P.L. 105-54, 111 Stat. 1175, signed by President Clinton on October 6, 1997, extended by six months the September 30, 1997 deadline to implement the reduction. The amendments have no effect on this case.

Leave to amend a pleading is ordinarily freely granted. Applicable rules ⁴ provide that

If and whenever a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order based on the complaint.

28 C.F.R. § 68.9(e) (1997).

Notwithstanding the failure to file an appropriate motion, amendment ought to be allowed if the underlying facts alleged by a complainant may be a proper subject for relief. Procedural rules are expressly designed to encourage decisions on the merits, not on the basis of technicalities. Cf. Conley v. Gibson, 355 U.S. 41, 48 (1957). Parties ordinarily ought to be afforded an opportunity to test their claims on the merits. Foman v. Davis, 371 U.S. 178, 182 (1962).

Where amendment would be futile, however, there is no reason to permit it. Even were I to permit the amendment requested, the complaint would still have to be dismissed because, as has repeatedly been held in this forum, a prospective employer has no legal obligation to accept a document as evidence of employment eligibility other than those set forth in the applicable statute and regulation. An amended complaint alleging the facts which Stephens sets forth would still be legally insufficient to state a cause of action and would not survive a motion to dismiss. Amendment accordingly would not facilitate determination on the merits.

Stephens provides no explanation as to how this case may be distinguished from the adverse precedents set forth. Rather, he simply reiterates legal conclusions already repeatedly rejected in those cases, arguing that an employer may not require a social security number as a condition of employment and that an employer is obligated under 8 U.S.C. § 1324b to honor his "Statement of Citizenship" and "Affidavit of Constructive Notice" and cease withholding from wages for taxes. He is mistaken.

The complaint, like the many others cited, is based upon an "indisputably meritless" legal theory. Whitney v. New Mexico, 113 F.3d 1170, 1173 (10th Cir. 1997), quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989). Repetitious litigation of virtually identical causes of action is properly characterized as frivolous, McWilliams v. Colorado, 121 F.3d 573, 574-75 (10th Cir. 1997), cf. Schlicher v. Thomas, 111 F.3d 777, 781 (10th Cir. 1997), and need not be indulged.

Stephens' complaint is dismissed.

SO ORDERED.

⁴ Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

Dated and entered this 31st day of December, 1997.

Ellen K. Thomas
Administrative Law Judge

APPEAL INFORMATION

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 1997, I have served copies of the foregoing Order of Dismissal on the following persons at the addresses indicated.

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